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Doubting Doubts, Rescuing Beliefs

Brian Z. Tamanaha and Reflections on Philosophy of Law

Kosuke NASU

1. Introduction

In this introductory paper, I'd like to make three points about the works of Tamanaha. First, I will present the general view on his entire works with their various aspects, and point out that there lies an interesting consistency in his approaches to these subjects, which I will call "reflexive skepticism". Second, I will argue that the foundation of this methodological approach is highly tied with his empathetic concern to the each individual society, together with its dynamics and variability. And lastly, I will examine how these considerations lead us to reflect on the method and the subject of today's philosophy of law, and on the legal development in modern Japan.

2. Wide Perspectives, Various Achievements

Brian Z. Tamanaha is a very active and prolific researcher. He has so far published more than 50 articles through his career, published 8 books on different themes in recent 20 years, each highly acclaimed from a wide range of fields. Notably, his concerns expand into so many aspects of legal practices and legal thoughts, with broad perspectives and deep insights. Even if summing them up a little crudely, I see his enterprises separated into at least five different arenas.

The first arena relates to the understanding of experiences of transplantation and development of the western law in the non-western countries. As he himself repeatedly acknowledges¹, he started his academic career with the reflections on his experience as an Assistant Attorney General of Yap State, Micronesia (and later as a Legal Counsel of Micronesian Constitutional Convention). In his first book, he tried to describe and

¹ Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law* (Oxford: Oxford U.P., 1999) [hereafter, *RSLT*] xiv; *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) [hereafter, *GJLS*] xi.

investigate his experience as a legal official in Yap, while reflected on the methodology for this attempt². And later he stepped into critical examination on the more general backgrounds of the so-called “Law and Development” studies and its core concepts — including the most basic assumptions of the dominant legal scholarship³.

The second arena developed from this first arena, with a more abstract orientation. Here he ventured into theoretical considerations about the conceptual apparatuses so that they might more accurately capture the contemporary circumstances of globalism and legal pluralism. He argued for the necessity of construction of literally “general” theory of law, liberated from the conventional restrictive assumptions, such as the state law as an only source of theorization of law, and the legal system as necessary constituent of the social order. Instead, he advocated more empirically oriented theory of law with the emphasis on the interpretive understanding of social practice, first called “socio-legal positivism” and later, “social legal theory.”⁴

Third arena may also be understood as an extension of the first arena, while it broadened much its perspective. As the one of the primary cause of Law and Development movement has been the establishment of the rule of law in the underdeveloped non-western countries, he scrutinized this concept from historical, political and theoretical perspectives⁵. This attempt revealed how the varieties of interpretations of this concept and their basic ideas have been formed and developed, and how the resulted ambiguity has incurred not only academic debates but also actual political conflicts.

² Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (Leiden: E. J. Brill, 1993a) [hereafter, *ULM*]; “Looking at Micronesia for Insights About the Nature of Law and Legal Thinking” 41 *The American Journal of Comparative Law* 9 (1993b); “Custom and Constitutionalism in the Federated States of Micronesia,” 3 *Asian-Pacific Law and Policy Journal* 1 (2002).

³ Tamanaha, “Review Article: The Lessons of Law-and-Development Studies,” 89 *American Journal of International Law* 470 (1995); “Understanding Legal Pluralism: Past to Present, Local to Global,” 30 *Sydney Law Review* 375 (2008b); “The Primacy of Society and the Failures of Law and Development,” 44 *Cornell International Law Journal* 209 (2011a), “The Rule of Law and Legal Pluralism in Development,” 3 *Hague Journal on the Rule of Law* 1 (2011b).

⁴ *RSLT*; *GJLS*; “Socio-Legal Positivism and a General Jurisprudence,” 21 *Oxford Journal of Legal Studies* 1 (2001); “What is ‘General’ Jurisprudence?: A Critique of Universalistic Claims by Philosophical Concepts of Law” 2 *Transnational Legal Theory* 287 (2011c); “The Third Pillar of Jurisprudence: Social Legal Theory,” Washington University in St. Louis Legal Studies Research Paper No. 13-04-01 (2013a) (unpublished: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256622)

⁵ Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) [hereafter, *ORL*]; Tamanaha 2001b, *supra* note 3.

In the fourth arena, he turned his eyes upon two core subjects of the history of Anglo-American — mainly from the 19th to 20th century of the U.S. — legal thoughts, which were legal instrumentalism⁶ and legal formalism⁷. In both works he critically reexamined today's conventional notions about history of legal thoughts, and detected their biases or distortions that have negatively affected to the ordinary legal practice, by citing wide range of writings of the judges as well as legal scholars.

The fifth arena also seems to be a product of rather independent interest, that is, legal education — especially the training system of the legal professions in the present U.S. society. His latest book, *Failing Law Schools*⁸ harshly attacked the present condition of the law school system by pointing out how they seriously suffer from over-competition among themselves, limitless increase of the salaries of the professors, putting enormous economical burdens on their students.

Now, such a cursory look of his entire bibliography would only give us an impression of discursiveness or ambiguity. In a way, it would not be easy for some readers to find any consistency in his arguments. Some might even find out several seemingly incoherent or contradictory claims in his writings⁹. Although each of his books and articles has its own clarity, the whole picture of his enterprises might leave a certain kind of vagueness and elusiveness.

But, of course, this is not my conclusion. In spite of the diversity of perspectives and achievements, by following carefully the paths he has pursued, we can draw out some common threads running through these diverse enterprises. Particularly, I see the most distinguishing aspects of works of Tamanaha are obvious in his approaches of

⁶ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006a) [hereafter, *LME*]; “How an Instrumental View of Law Corrodes the Rule of Law, 56 *DePaul Law Review* 469 (2007).

⁷ *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010) [hereafter, *BFRD*]; “Understanding Legal Realism,” 87 *Texas Law Review* 731 (2009).

⁸ Tamanaha, *Failing Law Schools* (Chicago: Chicago University Press, 2012) [hereafter, *FLS*]. And see also, “The Failure of Critics and Leftist Law Professors to Defend Progressive Causes,” 24 *Stanford Law and Policy Review* 309 (2013b).

⁹ Compare, for example, his criticism of the “mirror thesis” in *GJLS* (esp. ch.3) with his advocacy of the tradition of social understandings of law in “The Third Pillar of Jurisprudence” [*supra* note 4], or his objection to the rejection of significance of “Law and Development” movement in an earlier article [Tamanaha 1995, *supra* note 3] with his own flat assertion of “entire failure” of this movement in later article [Tamanaha 2008b, *supra* note 3].

problem-setting and underlying motives of the explorations, which here particularly I would like to turn to.

3. Common Threads

In my view, these threads have two aspects. One is relatively simple and clear, easy to follow in terms of our general understandings of legal thoughts. But the other is a little subtler and more intricate, nevertheless expresses a quite unique and interesting feature of his thought.

a. Critical View from Legal Pragmatism

As for the first aspect, it is rather obvious that his most basic concerns and perspectives have been shaped under the strong influence of legal pragmatism in a wide sense, including especially legal realism and critical legal studies¹⁰.

As an heir of legal realism, he has always tried to understand law in its relation to the concrete social contexts. Law cannot function or be understood in isolation from its society, because it is not just an autonomous system of rules nor discrete commands of the rulers, but is always a product of social, political and economical forces and settings, and conversely, always effects to the constellations of these factors, too. Of course the relation between law and society is variable depending on the historical and cultural context. But even when a society and its law seriously conflict or are completely indifferent to each other, nature or significance of law has to be understood in its background. This legal realist or, contextualist approach is particularly apparent, for example, in his contemplation on the “mirror thesis”¹¹ and argument of the “connectedness” of society¹².

¹⁰ *RSLT*, esp. ch.2.

¹¹ *GJLS*, esp. ch.3. (“Amidst this profusion of theories, however, a common presupposition can be found, that is: law is a mirror of society, which functions to maintain social order.” [*GJLS*, 3; emphasis original.]

¹² “...society is the all-consuming center of gravity of law and development. The term “society” is used here in a capacious sense — encompassing the totality of history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, and politics. No aspect of law or development operates in or can be understood in isolation from these surrounding factors. The qualities, character, and consequences of law are thoroughly and inescapably influenced by the surrounding society. There can be no standard formula for law because every legal context in every society involves a unique constellation of forces and factors. A good law in one location may have ill

On the other hand, the influence of the CLS is also evident in his criticism of the “Law and Development”. For example, he accused self-righteous attitude of the practitioners and theorists who supported the development of the legal institutions of the non-western underdeveloped countries, or ruthlessly exposed the biases within the law school system in the U.S., which structurally block the poor students from pursuing legal professions. He also repeatedly casts doubts on the universal desirability of the rule of law, and sometimes emphasized its adverse effects¹³. These critical charges to the optimistic endorsement of the contemporary liberal legalism and liberal institutions show the rather moderated, but still unmistakable influence from the Critics¹⁴.

Then, can we simply classify the standpoint of Tamanaha as one of the variants of the leftist skeptic to the dominant legal theory and practice, represented by legal realism and CLS? I think not. And here lies the second (and more elusive) aspect of his thought. His arguments often deviate from, or sometimes seem to go flatly against the typical claims of the legal realists or the Critical Theorists. For example, although the subjects of his two books about the history of legal thought were set along with the concerns of legal realists — instrumentalist understanding of law and criticism of formalist approach to legal interpretation —, his basic arguments went almost contrary to them; he condemned legal instrumentalism as the principal cause of loss of faith to the idea of the “higher law” and decay of the rule of law in the U.S.¹⁵; and he maintained that the famous realists’ attacks on legal formalism and their advocacy of the radical rule-skepticism are mostly illusory, because even the representative “formalist” judges and legal scholars in the late 19th century had explicitly acknowledged the need of more flexible or purposive interpretation of law¹⁶.

Furthermore, he has openly criticized the CLS’s claims, too. In “The Primacy of Society and the Failures of Law and Development,” he picked up the claim of the rule-skepticism by David Trubek, and contested that it sometimes had fatal damages to some societies.

effects or be dysfunctional elsewhere” [Tamanaha 2011a, *supra* note 3, 219].

¹³ *ORL*, 124-126.

¹⁴ For example, the Last chapter of *ORL* (“The Universal Human Good?”) is evidently echoing Morton Horwitz, “The Rule of Law: An Unqualified Human Good?” 86 *The Yale Law Journal* 561 (1977).

¹⁵ See, *LME*, Pt.3; Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law,” 56 *DePaul L. Rev.* 469 (2006b).

¹⁶ See, *BFRD*, ch.5.

...While it is healthy to expose the exaggerations of legal formalism in Western legal systems where the legal systems are well-entrenched, it is an entirely different matter to export skepticism about legal formalism to societies in which law barely functions. Skeptical views of legal formalism can prevent a legal system from getting off the ground. A legal system cannot work if the very notion that legal officials are rule-bound is perceived to be a fraud. In the absence of any legal restraints, power has its way, and the powerless mass of people in developing countries will have little protection.¹⁷

In contrast to the CLS's comprehensive skepticism to the possibility and desirability of the rule of law, or its suspicion of total failure of liberal legalism, Tamanaha is quite cautious about making such sweeping claims. Rather, he seems to be very skeptical of totalizing the skeptical views of legal realist or the Critics, just as well as totalizing the optimistic views of the dominant liberal legalists.

b. Reflexive Skepticism

Here lies the second — more elusive — aspect of the consistency of his enterprises. It might be said that the common threads in the various enterprises of Tamanaha are expressed in terms of his skepticism and cautiousness toward *all* kinds of unqualified theoretical extension of arguments without regard to the difference of contexts. Particularly, his own distinctiveness stands out in the fact that he has not hold back this critical attitude even toward the most radically skeptical arguments of legal realism or CLS, as well as toward the mainstream liberal legalist claims.

Indeed, legal rules themselves do not automatically command certain conclusion without judge's active involvement, and the rule of law or the bill of rights does not always guarantee peace and prosperity (or justice) to every society. Nevertheless, Tamanaha has carefully kept distance from the extreme rule-skepticism¹⁸ or blanket denial of the rule of law. While he rightly warns us about some defects and harmful effects of the rule of law, at the same time he willingly admits its universal values inherent in this principle.

¹⁷ Tamanaha 2011a, *supra* note 3, 241.

¹⁸ See, *BFRD*, ch.10.

...the rule of law carries the ever-present danger of becoming rule by judges and lawyers. Aside from having obvious anti-democratic implications, this raises additional concerns in societies where judges and lawyers are drawn exclusively from the elite, or from some other discrete subgroup. Countries working to develop the rule of law must be cognizant of these and other potential problems.¹⁹

When the rule of law is understood to mean that the government is limited by the law, the first cluster of meaning, Thompson is correct that it is a universal human good. The heritage of this idea, which first became firmly established in the Middle Ages, preexists liberalism; it is not inherently tied to liberal societies, or to liberal forms of government. Everyone is better off, no matter where they live and who they are, if government officials operate within a legal framework in both senses described, in the sense of abiding by the law as written, and in the sense that there are limits on law-making power.²⁰

Generally speaking, skepticism is quite prone to lapse into an easy agnosticism, especially when we lose sight of the reason or purpose of our doubt. But it is obvious that it is logically impossible to doubt *everything*. We can doubt something only when we believe some other things as self-evident. On the other hand, we also know that it is not always easy to identify what we actually believe, while we sometimes can express our doubts without any difficulty. It might be said that one of the most important role of skepticism is sorting out our hidden beliefs — securing what we cannot help believing but hardly be aware of — by doubting all that can be doubted.

So, in my view, Tamanaha's skeptical attitude toward the all-encompassing or destructive skepticism is not incomplete or halfway skepticism. Rather, it is a radical and elaborated way to find a belief worth believing through doubts upon doubts exhaustively— as it were, a reflexive skepticism.

This balanced, moderate attitude typically characterizes his discussions, which has always impressed me. It seems to me that he has been trying to find a narrow leeway for some reliable beliefs between excessive optimism and pessimism about possibilities of desirable relationship between societies and their laws, through his cautiously skeptic

¹⁹ *ORL*, 5.

²⁰ *ORL*, 137-138. See also *ORL* 119.

attitude. Some legal philosophers who are seized by a kind of theory-mania have an unfortunate habit of reducing one's "beliefs" totally to his commitment to some abstract principles or political, moral or theoretical standpoints. They classify others (or themselves) according to whether they commit or not to liberal legalism, accept or not the claim of indeterminacy of law, approve or not the transplantation of western legal system into nonwestern countries, belong or not to certain school of thought, etc. True, seen from this viewpoint, Tamanaha's standpoint may look indecisive and ambiguous. However, as we saw thus far, his consistency clearly lies more in *how* he believes it, than *what* he believes.

4. Rescued Beliefs, Underlying Motives

Thus, here we can pose two questions. First, after screening out all the doubtful convictions and doubtful doubts, what credible beliefs about law did he find? Second, what is the components and foundation of this skeptic attitude? In other words, how did he actually discern the acceptable claims from the unacceptable ones? Both two questions are now worth exploring.

But as for the first question, I do not have much to say here. In his works, he argued for the needs of legal development for non-western countries, not in the way of promoted by the "Law and Development" movements, but less state-centered or western-centered and more pluralistic and spontaneous way²¹; seeking legal theory not through the analytical nor the natural law approach, but through the more empirical — sociological, anthropological or historical — approaches²²; the minimum but universal value of the rule of law as a constraint to state power²³; the "balanced realism" in legal

²¹ "...Despite the largely negative tenor of this essay, ...it must be emphasized that the message of this essay is not to turn away from legal development. Every society in the world today requires an effective legal system that can, at a minimum, manage and support the activities of governmental and economic systems. The great benefit of the rule of law, furthermore, is in erecting legal restraints on the government—and an effective state legal system can deliver this type of restraint. For these reasons, law must develop and every effort should be made to help legal institutions develop in positive ways, with the awareness that this is a unceasing project"[Tamanaha, 2011a, *supra* note 3, 244].

²² *RSLT*; *GJLS*; Tamanaha 2011c (*supra* note 4) ; 2013a (*supra* note 4); "Insights about the Nature of Law from History", The 11th Kobe Memorial Lecture (2014).

²³ See above, note 20 and accompanying text.

practice, which requires compliance to the demands of legal rules and principles, but also allows rooms for purposive or consequentialist interpretations²⁴; ... and so on.

But my own concern is now attracted more to the second question. I'm interested more in *how* he rescued his beliefs from multiple of doubts, than in *what* he actually rescued. So let me leave the first question to the other commentators in this volume, who will provide us insightful examinations of each argument in much more details. Instead, here I myself concentrate on the task of understanding of how he has started and advanced his explorations, especially expounding elements and foundations, and implications of this aspect of his enterprise.

Looking back, Tamanaha's cautious attitude to the ambiguous roles of law was quite apparent in his earliest studies. The experiences in Yap offered him an opportunity to "estrangle" himself from the legal theories and practices he had been familiar with, just as David Trubek and Marc Galanter once pointed out²⁵. Through the reflections on these experiences, he came to realize that the problem lies not only in the Yap society, but also in the transplanted legal system itself or the shared assumptions about it among "exporters" of the western legal system. But as I mentioned, Tamanaha's critical reflection did not stop here. Instead of conforming entirely to such criticisms, he redirected his skeptical considerations toward them²⁶. While many critics were satisfied with just accusing these projects of liberal legalism as repressive and illusory, he attempted to examine closely these criticisms in order to seek out the truly valuable aspects of these "repressive and illusory" projects, that is, the rule of law.

This distinctive approach is pursued in his recent works more explicitly and self-consciously.

...Legal positivists who write about the nature of law emphasize that legal institutions serve social functions. Critical theorists emphasize that law entrenches, normalizes, and enforces hierarchy and inequality within complex societies, assisted by ideological support from cultural, religious and political beliefs. The mainstream and the critical view

²⁴ *BFRD* 186-196.

²⁵ David Trubek and Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," 1974 *Wisconsin Law Review* 1062 (1974).

²⁶ For example, he pointed out deficit of "strong" legal pluralism, which dismissed the positive role of the state government, while overlooking mutual influences between state law and informal social norms, or between multiple social norms [*ULM* 11-12].

each emphasize one side of law, downplaying the other. A full understanding sees both sides of law.²⁷

And he seemingly becomes more aware that this approach belongs to a tradition, which cannot be reduced to the legal positivist (analytic) approach nor the natural law approach, is traced its origin back to Montesquieu, developed by German historical jurisprudence, inherited by sociological jurisprudence or legal realism in the U.S. in the 20th century²⁸. These “third” approaches to the law share their interests in historical and cultural dynamics or variability of law²⁹; find the source of law in the process of interactions between multiple social forces (rather than wills of the legislator)³⁰; regard the society as an organic entity with complex structure that can hardly be manipulated from outside³¹. And they more or less emphasize the importance of the empirical researches as an indispensable means to cope with these tasks.

Now let me note that Tamanaha’s reflexive skepticism has always been founded upon his strong concern to the *functions* of law in its society. It seems to me that his contemplation about the concept of law has been mostly guided by the concern to the various functions of law — *both* positive and negative effects, or *ineffectiveness* — to the society, neither to its institutional autonomy nor normative justification³². We might not be able to even recognize or evaluate the functions of certain law or legal system in a society without knowledge of the characteristic features and tendencies of the society, which constitute the “connectedness” of its society³³ — or in Isaiah Berlin’s words, weave the “textures of life” of the people³⁴. However we understand the concept of “law” — such as the command of the Sovereign or the result of democratic deliberation, the revelation of the god’s will or prescription of human reason —, its functions are revealed and tested ultimately in the processes of the society. Thus, the best

²⁷ Tamanaha, “Insights about the Nature of Law from History”.

²⁸ *ibid.* See also Tamanaha 2013a.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.* See also his concept of the “connectedness” of law and society [Tamanaha 2011a 222-225, 232].

³² As will be mentioned below, I think most of the motives or orientations of exploration of the concept of law can be classified into these three basic categories. Depending on which one is emphasized, resulted conceptions of law would make difference in their basic characteristics.

³³ Tamanaha, 2011a, 232.

³⁴ Isaiah Berlin, “The Sense of Reality” in Berlin, *The Sense of Reality: Studies in Ideas and Their History* (London: Chatto & Windus, 1996) 26, 38.

interpretation of Tamanaha's somewhat puzzling formulation of the concept of law³⁵ would be that "the society" is always the ultimate judge of the legality, *i.e.*, what the law is to be determined by its functions in the social contexts or its processes.

Tamanaha's reflexive skepticism might be deeply rooted in these insights. Society's needs and aspirations, or forms of life of its members, play a crucial role of a touchstone or compass of the legal development for each society. What the law or the legal system *experiences* in the social context is always an indispensable element of what the law actually *is*. These considerations constitute a prerequisite assumption for his entire enterprises. As a philosophical pragmatist, he provides this functionalist concept of law not as a *conclusion* of his explorations, but as a *working hypothesis* for them.

5. Some Reflections on Philosophy of Law and Legal Development in Modern Japan

As concluding remarks, let me add some brief thoughts about the implications of considerations thus far. What can we learn from Tamanaha's reflexive skepticism?

First, I basically agree with his criticism to the narrow-mindedness of contemporary trends of the philosophy of law. As far as I know, it is true to some degree that while recent studies of legal theory tend to stress the law's institutional autonomy or its normative justification, they have not paid due attention to its functions. As Tamanaha recently pointed out³⁶, the latter approach seems to be avoided even as a hindrance to the pursuit of *universally true* conceptions of the legal system. It may be because identifying the functions of law and its social contexts naturally requires relying on some kind of empirical studies, which mainly deal with the *contingent and particular* elements of each society. However, lack of concern to the functions of law — ignorance of or indifference to how legal rules and principles are actually formed and reformed, or how they operate or are respected in the particular social process — might seriously damage the sensitivity to where and how the materials of legal theory should be sought.

³⁵ "Law is whatever people identify and treat through their social practices as 'law' (or *droit*, *recht*, etc.)" *GJLS* 166 [emphasis omitted].

³⁶ Tamanaha 2011c 289-290; 2013a.

On the other hand, the functionalist approach may have its own shortcomings. In particular, if we put too much emphasis on the functions of law, it seems to me that two problems will arise immediately, and they would directly bring two difficulties to the studies or practices of legal development. To put it bluntly, One is a problem of conservatism; as we emphasize the complexity (or, “connectedness”) of the society, it may become harder to consciously take an active part in the process of the development, because of lack of reliable knowledge to do so. We may well be hesitant to take reformist policies. And the other is problem of interventionism (and limitless legal instrumentalism); contrary to the conservatism, as far as we confidently believe that we can comprehend the needs and desires of the society and design the (legal) means to fulfill them, the border between the *promotion* (or *assistance*) of development and the *enforcement* (or *imposition*) of development will be easily blurred and lost. Although Tamanaha has strongly criticized the self-righteous interventionism of the “Law and Development” studies and practices, it seems to me that he still does not find a promising way of getting through between these two difficulties³⁷.

Furthermore, when focusing on the particular circumstances in Japan, things would become more complicated. Modern Japanese society has lived through major legal transplantations twice (or three times?) in these 120 years. Compared to other societies with similar experiences, it seems that these projects were outstandingly successful in Japan, in that they scarcely provoked serious social confrontations or effective objections to them. Even during the time of their greatest crisis, in the period of nationalism and totalitarianism, the general framework of transplanted legal system was maintained and played its roles for the most part; and the defeat in the WW II provided just another opportunity for imitation of and adaptation to the modern western legal system on a large scale. By these comparatively fortunate and successful experiences of legal development, modern Japanese society seems to have dispensed with the radical doubt on the possibility or desirability of the legal transplantation projects in Japan.

³⁷ Also note the ambiguity of the idea of “development”. It sometimes means just *growing* – that is, naturally and spontaneously thriving – and becoming more mature, advanced, or elaborate, but sometimes mean *causing to grow* – that is, forcibly or encouragingly promoting maturity or advancement.

But were they really “fortunate and successful” experiences? Of course yes in one respect, but at least it is undeniable that they have accompanied some crucial sacrifices. A Japanese Sinologist Yoshimi Takeuchi once compared the modernization process of Japan with that of China, pointed out that while the former had proceeded very smoothly and achieved a solid success, the latter had faced lots of political or cultural resistance and conflicts and brought about substantive sacrifices. In the functionalist perspective, it would be quite obvious that modernization projects were successful in Japan, failed in China.

But Takeuchi thinks quite differently. According to his diagnosis, the great “success” of Japanese society was a result of its blind earnestness and meek obedience, pursuing its given (or forced) object without questioning to it. On the other hand, the hardships of Chinese society was caused mainly by the awareness of profound discomfort and doubt toward the values and institutions that were being imported from the western countries into China, as well as toward the stubborn and repressive Chinese traditions or customs at that time³⁸. Upon this comparison, Takeuchi argued that the excellence of Japanese society is a product of their sheer servility, blindness to their own subordination and loss of intellectual or moral independence. Indeed, he tacitly questioned the shallowness and fragility of the modernity of Japanese society.

Thus, in Takeuchi’s view, in the society like Japan, the well-functioning legal system still may not indicate its endorsement of or reliance on the law. Rather, Japanese society might be just insensitive or indifferent to the significance of transplanted laws, because its “social context” does not play the substantive role of the touchstone for the function of law, contrary to Chinese society. For example, in Japan when people think about the functions of their law, unconsciously they see only the effectiveness of the *government power*, not the law’s inherent force — or more exactly, they do not distinguish those two. So in this case, the core assumption or working hypothesis of Tamanaha does not seemingly work well in Japanese society — because people define the law as “whatever the government identifies and treats as ‘law’”.

³⁸ Takeuchi Yoshimi, “What Is Modernity? (The Case of Japan and China),” in Takeuchi (Richard F. Calichman ed. & trans.), *What Is Modernity?: Writings of Takeuchi Yoshimi*, (Columbia University Press, 2005).

Still, I myself am quite sympathetic to the approach that Tamanaha employed. As far as I understand, his reflexive skepticism will contribute to grope for what actually should be (or should have been) accepted and relied on in the transplanted legal system of Japan. But to do this, we will have to learn more from the experiences of failure, and the defiant, recalcitrant and stubborn part of this society. An aphorism of ancient China says, “To trust in what is trustworthy is trustworthiness. To doubt what is doubtful is also trustworthiness”³⁹. Takeuchi loved to cite the latter phrase, reinterpreting; “To doubt your own doubt is another route toward your conviction”. Thus, as far as we doubt our success in legal development of Japanese society — and our doubts about our own achievements as well, we can unveil the real significance of the legal development or the rule of law. In this sense, the experience of Japanese society, which belongs to one of the most “developed” society in the non-western world, offers an irreplaceable and widely applicable example for the development studies, whether good or bad.

³⁹ *Xunzi: The Complete Text* (translated with an introduction by Eric L. Hutton), Princeton University Press, 2014, 42-43.